HAMIDON BIN MAT YATIM

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CRIMINAL APPEAL NO. 42-6-1994]
2 MAY 1995

EVIDENCE: *Corroboration - Whether complainant an accomplice - Whether corroboration required - Whether there was corroboration - Whether corroborative evidence sufficient to support conviction - Prevention of Corruption Act 1961 s. 18.*

EVIDENCE: *Evidence of tape recording - Admissibility - Failure to object before trial Court - Whether too late to challenge on appeal.*

EVIDENCE: *Adverse inference - Presumption of - Failure by prosecution to mark second cassette as exhibit - Effect - Section 114(g) Evidence Act 1950 - Whether could be invoked when there was no attempt to conceal cassette or suppress evidence thereof.*

CRIMINAL LAW: *Corrupt acceptance of gratification - Section 4(a) Prevention of Corruption Act 1961 - Ingredients - Whether proved - Presumption of corrupt gratification - Whether rebutted.*

The appellant, the Assistant Director of Registration at the Registration Department, Johor Bahru, was charged under s. 4(a) Prevention of Corruption Act 1961 for corruptly receiving RM500 from one Rasul bin Dahri, the complainant herein, in relation to Rasul's daughter's late registration of birth. The facts showed that upon the request for the money being made by the appellant, the complainant immediately contacted the Anti Corruption Agency (ACA) and thereafter a trap was laid by the latter. In consequence the complainant made a telephone call to the appellant and the conversation that transpired, which revealed the appellant's demand for the money, was tape recorded by the ACA. Later, Rasul handed over the trap money to the appellant at the latter's office, and following a raid by the ACA officers, the money was found underneath the left thigh of the appellant. The trial Sessions Judge, on the evidence, found the appellant guilty as charged and upon conviction sentenced him to a fine of RM8,000, in default four (4) month's imprisonment. On appeal to the High Court, the following issues arose for determination:

1. Whether the complainant was an accomplice.
2. Whether corroboration of his evidence was required.
3. Whether there was corroborative evidence, and if so, whether it was sufficient to support the conviction herein.
4. Whether the ACA tape recording was properly admitted in evidence.
5. Whether the prosecution's failure to mark as an exhibit a second cassette tape which the complainant had carried along when he met the appellant, in the circumstances, attracted the presumption of adverse inference under s. 114(g) Evidence Act 1950.
6. Whether the presumption of corrupt gratification had arisen, and if so, whether the appellant, by his defence, had rebutted the same.

Held:

[1] The complainant had not played an active part in the transaction and did not commit any infamous conduct. He was not therefore an accomplice. Also, in view s. 18 of Prevention of Corruption Act 1961, he could not be presumed to be unworthy of credit.

[2] Even if the complainant was an accomplice, there was ample corroborative evidence to support the prosecution case. This evidence came in the form of the discovery of the trap money under the appellant's left thigh and the cassette tape which was recorded by the ACA of the conversation between the complainant and the appellant.

[3] The amount of corroboration required to support a conviction depends to a large extent on the circumstances, particularly the nature of the crime charged and the degree of complicity of the accomplice. The two pieces of tangible evidence aforesaid, however, were sufficient corroboration to link the appellant with the crime.

[4] The cassette tape that the complainant took along with him when he met the appellant on 31 December 1992 was marked as 1D8 and was not suppressed by the prosecution. The failure to mark 1D8 as exhibit P8 herein, having regard to the other evidence adduced, did not cripple the prosecution's case. Nor could such failure attract s. 114(g) of the Evidence Act as the prosecution never made any attempt to conceal or suppress the existence of that tape. The bottom line of it all is that the prosecution could still prove its case beyond reasonable doubt even without 1D8.

[5] The appellant had admitted that the tape recording was the conversation between him and the complainant and the facts showed that no objection to the admissibility of P9 was taken in the trial Court below. It is too late in the day for the defence to raise it at the appeal stage, especially so when it played dumb before the trial Court.

[6] The appellant's defence was carefully considered by the trial Court and was rejected. Clearly, on the of probabilities the appellant had failed to discharge the burden to disprove and rebut the presumption against him.

Per Curiam:

The appellant should consider himself lucky that there was no cross-appeal by the prosecution against inadequate sentence. If there was one the appellant might end up in prison after the appeal was heard by me. I must stress that in cases of corruption it is necessary to impose a sentence of imprisonment as a sentence of fine has no deterrent effect. Corrupt Government servants should be sentenced severely not only as examples to others but also to protect the image of the Government service as a whole. The fact that the appellant here has lost his important post and has suffered the anguish of a trial and the appeal is not a mitigating circumstance.

[Appeal dismissed].

Cases referred to:
PP v. Yuvaraj [1969] 2 MLJ 89 PC ***(foll)***
Rattan Singh v. PP [1971] 1 MLJ 162 ***(dist)***
Mohamed Taufik v. PP [1975] 1 MLJ 36 ***(foll)***
Soosay Dass v. PP [1951] 17 MLJ 57 ***(refd)***
Daimon bin Banda v. PP [1953] 19 MLJ 23 ***(refd)***
Ng Kok Lian & Anor. v. PP [1983] 2 MLJ 379 ***(foll)***
Ramly bin Md. Yasin & Ors. v. PP [1982] CLJ 91 ***(foll)***
Ghazali bin Salleh & Anor. v. PP [1993] 3 CLJ 638 ***(refd)***
R v. Khoo Guan Teik [1957] MLJ 128 ***(refd)***

Lee It Leo v. R [1954] MLJ 215 ***(refd)***
Attan bin Abdul Gani v. PP [1970] 1 MLJ 143 ***(refd)***
PP v. Datuk Hj. Harun bin Hj. Idris (no:2) [1977] 1 MLJ 15 ***(refd)***
PP v. Ng Nee Tiak [1962] 28 MLJ 421 ***(cit)***
Mohd bin Long v. PP [1972] 1 MLJ 76 ***(cit)***
Balakrishnan v. PP [1969] 2 MLJ 61 ***(cit)***
PP v. You Kong Lai @ Er Kong Lai [1984] 1 CLJ 379 ***(cit)***
AEG Carapiet v. AY Derderian [1961] AIR Cal. 359 ***(refd)***
Re Pichi Muthu [1970] 2 MLJ 143 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 FC ***(refd)***
Vijayaratnam v. PP [1962] MLJ 106 ***(cit)***
Sultan Mohd. v. R [1952] MLJ 186 ***(cit)***
Munusamy v. PP [1987] 1 CLJ 250 SC; [1987] 1 MLJ 492 SC ***(foll)***
Stirland v. Director of Public Prosecutor [1944] AC 315 PC ***(foll)***
Hamsa Kunju v. Regina [1963] 29 MLJ 228 ***(foll)***
Rex v. Teo Cheng Lian, Rex v. Leck Kwee See [1949] 15 MLJ 170 ***(cit)***
Goh Leng Sai v. Reg [1959] 25 MLJ 121 ***(cit)***
Mansell Jones & Anor. v. PP [1952] 18 MLJ 43 ***(cit)***
PP v. Yap Chong Fatt [1963] 29 MLJ 136 ***(cit)***
Mraz v. The Queen [1955] 93 CLR 493 ***(dist)***
Dalbir v. S [1977] Allahabad 472 SC ***(foll)***

Legislation referred to:
Prevention of Corruption Act 1961, ss. 4(a), 14
Prevention of Corruption Ordinance 1950, s. 13(3)
Evidence Act, s. 114(g)

For the appellant - Nordin Hussin; M/s. Tia and Nordin
For the respondent - Ahmad bin Bache; DPP

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak J:

The Sessions Court, Johor Bahru ("trial Court") convicted the appellant for an offence under s. 4(a) of the Prevention of Corruption Act 1961 ("PCA") and sentenced him to a fine of RM8,000 in default four (4) months' imprisonment and additionally a penalty of RM500 was imposed on the appellant. Aggrieved by this decision, the appellant lodged an appeal.

Before the trial Court, the appellant was charged as follows:

> Bahawa kamu pada 31 December 1992 jam lebih kurang 12.45 tengah hari di Bahagian Pendaftaran Kelahiran, Kematian dan Anak Angkat, Jabatan Pendaftaran Negara, Johor Bahru, Tingkat 1, Blok A, Wisma Persekutuan, Johor Bahru, dalam Daerah Johor Bahru, dalam Negeri Johor, sebagai ejen kerajaan Malaysia, iaitu Penolong Pengarah Pendaftaran di Jabatan Pendaftaran Negara, Johor Bahru secara rasuah menerima suatu suapan, iaitu wang tunai RM500 daripada Rasul bin Dahri sebagai satu dorongan untuk melakukan suatu perbuatan berhubong dengan hal ehwal prinsipal kamu iaitu untuk memproses permohonan pendaftaran lewat kelahiran anak kepada Rasul iaitu Samirah bte Rasul supaya di pertimbangkan untuk kelulusan Pendaftaran Besar Jabatan Pendaftaran Negara, Petaling Jaya dan dengan itu kamu telah melakukan satu kesalahan dan boleh di dakwa di bawah seksyen 4 (a) Akta Pencegah Rasuah 1961 (Undang-Undang Malaysia Akta 57).

Within a broad perspective, the facts are as follows. Rasul's (the complainant) second wife gave birth to a baby girl by the name of Samirah on 5 June 1991. Rasul took time to report the birth of his daughter and when he decided to do so at the Johor Bahru Central Police Station he was advised to proceed to Pejabat Pendaftaran, Johor Bahru for that purpose. At

the Pejabat Pendaftaran, Rasul was attended to at the counter by Halimah bte Jumaat (SP 5) ("Halimah") who gave him a form to fill. After Rasul completed filling the form and obtained the necessary signatures he went to see Halimah and handed her that form (P3). In due course, Halimah handed the form (P3) to the appellant who was supposed to fix the date for an interview. The first interview was scheduled on 24 November 1992 but Rasul failed to turn up and the second interview was then fixed on 29 December 1992. At this second interview, the appellant interviewed Rasul and his second wife by the name of Hasnah bt Mohd. Said ("Hasnah") together with two nurses (Mariam binti Abdul Kadri (SP3) and Juriah bte Yahya (SP4). The first to be interviewed was Rasul's wife and this was followed by Rasul himself. For the purpose of this appeal, I need only narrate briefly what transpired at that interview between Rasul and the appellant.

Rasul testified that at that interview the appellant scolded him for coming late. The appellant then told Rasul that there was a possibility that his daughter might not be issued with the birth certificate or if issued there would be a delay of three (3) to four (4) years. Rasul then pleaded with the appellant to expedite his application as he wanted to bring his daughter to Singapore. The appellant was then heard to have said that he could not help unless Rasul helped himself. The appellant then said that Singaporeans would be charged RM5,000 but because Rasul was a Malay he only had to pay RM2,000. Rasul again pleaded with the appellant and after much hassles the appellant relented and agreed to accept RM700 and requested Rasul to bring the money the next day.

There was evidence that Rasul is a Singaporean.

Immediately after that nasty encounter with the appellant, Rasul telephoned the Badan Pencegah Rasuah, Johor Bahru ("BPR") at about 3.15 p.m. and he was told to proceed to the BPR's office. Rasul went to the BPR's office and met Alias bin Salleh (SP8) ("Alias") and there he narrated the incident that took place at the appellant's office. As it was getting late and as the next day was a public holiday, Rasul was requested to come again on 31 December 1992.

Thus, on 31 December 1992 when Rasul turned up at the BPR's office, his report was recorded (P4) and Alias requested him to telephone the appellant. The telephone conversation between Rasul and the appellant was tape recorded by Rosni bin Kamidi (SP12) ("Rosni"). Rosni heard that telephone conversation on his head phone and in the course of the trial that cassette tape was tendered as prosecution Exhibit P9. Rasul testified that in that telephone conversation the appellant demanded RM500 when Rasul told the appellant that he (Rasul) did not have enough money. The appellant then requested Rasul to come the next day before 12.45 p.m. with the money. Incidentally, Rosni corroborated that part of Rasul's evidence pertaining to the telephone conversation and Rosni himself testified that he could recognise the appellant's voice as he used to have dealings with him on an official basis.

Rasul was then handed the trap money by one of the BPR's officers and he was told to signal by pulling up the sleeves of his shirt once money had passed. Rasul then proceeded to the appellant's office and upon arrival Rasul was called into the appellant's office. Rasul was shown the file (P3) by the appellant and he then handed RM500 to the appellant who accepted it with his right hand. Rasul left the appellant's office and he spotted both Alias and Zulkifli bin Abdul Hamid (SP11) ("Zulkifli") at the counter. On seeing these two BPR's officers, Rasul gave the signal.

Alias and Zulkifli swung into action. They entered the appellant's office and placed him under arrest. The trap money was recovered by Zulkifli from underneath the left thigh of the appellant.

The ingredients of s. 4(a) of the PCA have been lucidly set out in *PP v. Yuvaraj* [1969] 2 MLJ 89 PC by Lord Diplock in the following words:

> Where a defendant is charged with an offence under s. 4(a) of the Prevention of Corruption Act 1961, to which s. 14 also applied, the onus lies upon the prosecution to prove the first two factual ingredients of the offence *viz*. (1) that a gratification was paid or given to or received by the defendant and (2) that at the time of the payment, gift or receipt he was in the employment of a public body. Upon proof of these two ingredients the existence of the third ingredient, *viz*. (3) that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs of that public body, is to be presumed "unless the contrary is proved."

That a gratification was paid or given to or received by the appellant

Rasul was the anchor witness for the prosecution. Through Rasul the prosecution unfolded the story of the nasty encounter between Rasul and the appellant at the latter's office. There the appellant demanded the money from Rasul in order to expedite the processing of the birth certificate of Rasul's daughter. Encik Nordin Hussin submitted on behalf of the appellant that Rasul played an active part in the arrest of the appellant and that Rasul had bargained with the appellant in regard to the quantum of the corrupt money and, finally, Rasul had agreed to give the corrupt money. All these, according to Encik Nordin Hussin, amounted to an infamous conduct within the scope and purview of *Rattan Singh v. PP* [1971] 1 MLJ 162 and, consequently, Rasul should be considered an accomplice whose evidence ought not to be accepted unless corroborated in material particulars. With respect, the facts in the present appeal are poles apart from that of *Rattan Singh*. There PW1 went beyond concurring to give the corrupt money to the appellant and after concurring PW1 went to see his two colleagues, PW2 and Mahadevan, and suggested that each of them should raise the money to pay the appellant to which they all agreed. PW1 did not lodge a report until after PW2 had told him that he (PW2) had done so. PW1 was prepared to bribe the appellant and went to the extent of negotiating with PW2 and Mahadevan on the matter. Here, Rasul telephoned the BPR's office after the appellant corruptly solicited the money and when told to proceed to the BPR's office Rasul complied and there he narrated the incident to the BPR's officers. This was on 29 December 1992. The next day (30 December 1992) was a public holiday and Rasul did not do anything infamous like PW1 in *Rattan Singh's* case. It was only on 31 December 1992, as requested by the BPR, that Rasul once again turned up at the BPR's office.

It must be borne in mind that Rasul did not unilaterally offer corrupt money to the appellant when he went to see the appellant at the appellant's office. On the contrary, it was the appellant that corruptly solicited the money when Rasul met him in regard to his application (P3). The bargaining which Rasul participated in order to reduce the quantum of corrupt money from RM2,000 to RM700 could not, in the circumstances, turn him into an accomplice. At that point of time Rasul was more concerned about the fate of his daughter's birth certificate and foremost in his mind too was his desire to bring his daughter to Singapore. One must not forget the scenario then. When Rasul met the appellant it was solely to obtain his daughter's birth certificate and he must have realised that if he did not agree to pay a certain amount of money, the appellant would cause problem in regard to his application (P3). In my judgment, Rasul had not played an active part in the transaction and he was not an

accomplice. In any event in view of s. 18 of the PCA, Rasul could not be presumed to be unworthy of credit (*Mohamed Taufik v. PP* [1975] 1 MLJ 36). The trial Court too adopted the same stand as far as Rasul was concerned and, in my judgment, that was a correct appraisal of the role of Rasul.

In *Soosay Dass v. PP* [1951] 17 MLJ 57, the headnote reads as follows:

> The Prevention of Corruption Ordinance 1950, s. 13(3) (in *pari materia* with our present s. 18 of the PCA) modifies the law and practice not as to accomplices generally but only as to a specified class of accomplices. In cases to which this Ordinance applies a witness who is an accomplice only by reason of making a corrupt payment is not presumed to be unworthy of credit.
>
> A person who makes a corrupt payment only under pressure is less seriously discredited than one who does so voluntarily.

The effect of s. 13(3) of the then Prevention of Corruption Ordinance 1950 (in *pari materia* with our present s. 18 of the PCA) was again considered in *Daimon bin Banda v. PP* [1953] 19 MLJ 23. There a police constable was convicted of receiving RM100 bribe upon the evidence of witnesses who were clearly and undisputedly accomplices and not independently corroborated. In the appeal before Taylor J, the prosecution sought to support the conviction by relying upon the provision of s. 13(3) of the 1950 Ordinance contending that by virtue of the provision the rule as to accomplice's evidence in the trial of corruption cases did not apply at all. Taylor J rejected the prosecution's submission and allowed the detective's appeal. In his judgment, his Lordship said this:

> That provision, however, does not abrogate the rule. It introduces only a limited modification. It does not apply to accomplices generally. The word 'accomplice' does not appear in the subsection. The effect of the new provision is that in corruption cases the mere fact that a man has made an improper payment is not by itself enough to brand the man as a person whose evidence, if uncorroborated, is probably untrustworthy. If the man has taken part in the transaction in such a way as to show that, apart from the bare payment, he was an accomplice, then the ordinary rule applies.
>
> The subsection is in the nature of an exception to a standing rule of evidence and, as an exception, it must be construed strictly. It must not be extended.

Perhaps the best approach to adopt in cases involving accomplices would be to follow the guidelines set by Salleh Abas CJ (Malaya) (as he then was) in *Ng Kok Lian & Anor. v. PP* [1983] 2 MLJ 379. In that case his Lordship said this:

> Thus in every case when the issue is raised that a witness is an accomplice the Court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his *actus reus*. The whole idea is completely contrary to the basic concept of criminal liability.

Upon examining the evidence, I am not prepared to brand Rasul as an accomplice.

Now, even if Rasul was an accomplice his evidence was materially corroborated by the discovery of the trap money (P10) under the left thigh of the appellant. In this regard Syed Agil Barakbah J, (as he then was) in *Ramly bin Md. Yasin & Ors. v. PP* [1982] CLJ 91 has this to say:

> The discoveries of the marked notes from each of the appellants are independent corroborative evidence which led to one and only irresistible conclusion that the appellant received the money from PW12. The presumption under s. 14 of the Act that the gratification is deemed to have been given and received by the appellants corruptly as an inducement or reward, arises.

Another corroborative evidence would be the cassette tape (P9) which recorded the telephone conversation between Rasul and the appellant that was tape recorded by Rosni. This cassette tape tied the rope of guilt around the appellant's neck and it was certainly a piece of damning evidence. The transcript of that tape-recorded conversation (P9) makes for interesting reading and it is as follows:

Transkripsi Pita Rakaman
JBR: 28477/92

Transkripsi Dari Pita Rakaman Jenis TDK D60 Bertanda Johor Bahru RPT: 28477/92, 31 December 1992 @ 11.49 AM, Tel: 230614 - 245388.

(Saya Rosni bin Kamidi, Penolong Pegawai Siasatan akan membuat rakaman percakapan telefon antara Encik Rasul bin Dahri dan Haji Hamidun bin Mat Yatim di Pejabat Badan Pencegah Rasuah Johor berhubung dengan Johor Bahru Repot: 28477/92. Panggilan telefon dibuat daripada 230614 kepada 245388 pada 31 December 1992 jam 11.45 pagi).

toot... toot... toot...
toot, toot, toot, toot, toot, toot,
toot-toot... toot

1. Suara A: Pendaftaran toot... Hello.
2. Suara B: Hello.
3. Suara A: Ya.
4. Suara B: Boleh saya cakap dengan Hj. Hamidun.
5. Suara A: Ya, Hello.
6. Suara B: Ya, saya.
7. Suara A: Sebentar Ya.
8. Suara B: Ya.

(Bunyi muzik kedengaran)

9. Suara C: Hello.
10. Suara B: Hello.
11. Suara C: Ya.
12. Suara B: Ni Hj. Hamidun, ya.
13. Suara C: Siapa cakap ni.
14. Suara B: Saya Rasul.
15. Suara C: Rasul.
16. Suara B: Ya.
17. Suara C: Err... err... Nak datang sekarang.
18. Suara B: Macam ni, saya sebenarnya tak kecukupanlah.Tak pun macamana kalau kita apa, lewatkan sikit, Hari...
19. Suara C: No, no, saya ada...
20. Suara B: Kalau hari ini.
21. Suara C: No, saya pun ada problem.
22. Suara B: Ada problem, ya.

23. Suara C: You tolong saya...
24. Suara B: Ya.
25. Suara C: Iaitu five pun dulu cukup.
26. Suara B: Ha... ha.
27. Suara C: Tolong datang sekaranglah. Saya tengah tunggu awak, sebab saya ada nak cover, saya ada hutang, ada nak cover bank, tolonglah.
28. Suara B: Jadi kalau sekarang, pukul berapa.
29. Suara C: Sekarang 11... sekarang 11.40. So tolong datang sebelum 12.45 sebab saya betul-betul importantlah.
30. Suara B: Baik, agak-agak Cik Midun cukup berapa.
31. Suara C: No, no, kalau tak dapat tujuh pun bayar, dapat lima pun tak apa.
32. Suara B: Lima Ratus.
33. Suara C: Aha, tolong.
34. Suara B: Lima ratus ringgit Malaysia.
35. Suara C: aha, ya.
36. Suara B: Jadi...
37. Suara C: Tolong... tolong dan...
38. Suara B: Wang tu wang cashlah.
39. Suara C: Aha, aha, dan... saya pun, saya... kertas sokongan ini berada di depan saya.
40. Suara B: Ehh...
41. Suara C: Saya tunggu you datang aje saya nak bagi you tengok.
42. Suara B: Macamana kalau saya datang dua belas suku lebih kurang.
43. Suara C: Ha, O.K, boleh.
44. Suara B: Ehh...
45. Suara C: Boleh-boleh, sebab... sebab saya nak pergi cover bank, betul cakap.
46. Suara B: Jadi agak-agak berapa, lima ratus boleh ya.
47. Suara C: Lima ratus boleh dululah. Tak apa. Bagi, bagi dulu cash, O.K.
48. Suara B: Jadi, cash money.
49. Suara C: Saya tunggu ya, O.K.
50. Suara B: O.K., O.K.
51. Suara C: O.K. Bye.

(Saya Rosni bin Kamidi, Penolong Pegawai Siasatan menghentikan alat perakam pada jam 11.49 pagi).

Disediakan oleh

t.t.
Nor Azmi Karim
Pegawai Siasatan
BPR Johor.

I am fortunate to be given the opportunity to listen to the tape-recorded conversation (P9) in open Court and the entire conversation was clearly audible and intelligible. It was an exact replica of the transcript word for word. Safety precautions in handling the tape-recorded conversation (P9) were adopted by the BPR officers. Rosni broke the safety pin to the tape so as to ensure that the tape would not be tampered with or retaped twice over. Rosni himself heard that tape-recorded conversation and he was doubly sure that that was the appellant's voice. Rosni was familiar with the appellant's voice as he used to come in contact with the appellant on official basis. There was also evidence that the cassette tape (P9) was closely guarded. Rosni handed the tape-recorded conversation (P9) to Alias who in turn handed it to Nor Azmi bin Khalid (SP9) ("Nor Azmi") for safekeeping. Nor Azmi said this in his evidence:

> Semasa saya terima pita ini safety catch telah di patahkan - ini bermakna kandungan dalam tape ini tidak boleh di padamkan dan tidak boleh tape atas lagi balik. Saya simpan tape sehingga sekarang. Saya simpan dalam brief case saya yang berkunci yang mana brief case tersebut saya simpan dalam peti cabinet dan juga berkunci. Tiada siapa lagi boleh capai tape ini. Saya tidak ada simpan apa-apa barang logam atau magnetic dalam kabinet saya.

I have said in regard to the safekeeping of a tape-recorded conversation in *Ghazali bin Salleh & Anor. v. PP* [1993] 3 CLJ 638 and which would apply equally to the present appeal, in the following terms:

> Since the tape-recorded conversation is susceptible to interference, and can be easily altered, there must be evidence to show that it is well guarded. The essence of any safeguard which is at once real and understandable seems to lie in physically guarding the disc or tape as soon as a recording has been made on it; and making sure that it is under guard until it is needed for a lawful occasion or until it is brought to the Court.

It is an entrenched rule that an unbroken chain of evidence must be established by the prosecution as to the retention and custody of an exhibit from the moment it is first seized to the time it is produced in Court (*R v. Khoo Guan Teik* [1957] MLJ 128 and *Lee It Leo v. R* [1954] MLJ 215). This rule has been observed in the instant appeal to the very letter.

Would these two corroborative evidence be sufficient to convict the appellant? It is appropriate to answer this question by first stating the obvious and that is this. The amount of corroboration required depends to a large extent on the circumstances, particularly on the nature of the crime charged and the degree of the complicity of the accomplice. It is dangerous to lay down any general rule on the subject. In dealing with the question as to what amount of corroboration is required, the Court must exercise careful discrimination and look at all the surrounding circumstances, in order to arrive at the conclusion, firstly, whether the facts deposed to by the accomplice are borne out by those circumstances, secondly, whether the circumstances are of such a nature that the evidence should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by the accomplice. Now, reverting back to the question, I am reminded of what the late Sharma J, said in *Attan bin Abdul Gani v. PP* [1970] 1 MLJ 143 to the effect that:

> The minimum corroboration which the law ordinarily requires of the evidence of an accomplice of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case.

Again, it was said in *PP v. Datuk Hj. Harun bin Hj. Idris* (no:2) [1977] 1 MLJ 15 especially at p. 19:

> It would be enough corroboration if there is independent evidence of relevant circumstances connecting the accused with the crime.

These authorities would positively show that these two corroborative evidences being tangible in form were sufficient corroboration to link the appellant with the crime.

That at the time of the payment, the appellant was in the employment of a public body

There was more than ample evidence through Abu Saman @ Osman bin Bakar (SP1) and Halimah to show that the appellant was in the employment of a public body at the time of the commission of the offence. The appellant was said to be the Penolong Pengarah Pendaftaran and in that capacity he was in charge of the "bahagian kelahiran dan kematian" and he was also responsible to conduct interviews of applicants and their witnesses in relation to late registration of births. After those interviews the appellant was required to prepare reports together with his recommendations to the headquarters in Petaling Jaya, Selangor. It is crucial to mention here that without the recommendations of the appellant, the applications for late registration of births would be rejected outright by the headquarters. That was the magnitude of the power vested in the appellant; the power which he wielded to satisfy his greed and which ultimately led to his downfall.

To recapitulate, the trial Court rightly held that the appellant received the gratification from Rasul and this would automatically trigger the presumption under s. 14 of the PCA. It then becomes the duty of the appellant to disprove and the burden has been set out by Lord Diplock in *PP v. Yuvaraj* (*supra*) to be: on the balance of probabilities (see also *PP v. Ng Nee Tiak* [1962] 28 MLJ 421; *Mohd bin Long v. PP* [1972] 1 MLJ 76; *Attan bin Abdul Gani v. PP* [1970] 2 MLJ 143; *Balakrishnan v. PP* [1969] 2 MLJ 61 and *PP v. You Kong Lai @ Er Kong Lai* [1984] 1 CLJ 379). This brings me to the third ingredient which by evidence clearly shows that the appellant had used his power to obtain gratification as an inducement to issue the birth certificate to Rasul's daughter.

What was the defence of the appellant in the face of the formidable evidence put forward by the prosecution?

The appellant in his defence admitted that Rasul attended the interview on 29 December 1992 in regard to the late registration of birth of his daughter (P3). The appellant stated that in the course of that interview Rasul was arrogant, proud and exhibited stubbornness in answering questions. Rasul had requested for his application to be expedited and promised to pay RM700. The appellant stressed that he did not at any time request money from Rasul in order to help him. When Rasul offered the money, the appellant merely told him that it was up to him whether to pay or not pay. Rasul then left the interview room after promising to return but according to the appellant Rasul did not fix the time when he (Rasul) would pay the money.

Two days later, at about 8.30 a.m., the appellant testified that Rasul telephoned him from a public booth and said that he did not have enough money to make the payment as promised by him on 29 December 1992. To this, the appellant testified that he told Rasul that it was entirely up to him (Rasul) whether he wanted to pay or not as he (appellant) had not requested for the money.

In his defence, the appellant testified further that he received the second telephone call from Rasul on about 11.00 a.m. on the same day. The appellant admitted that Exhibit P9 was the tape-recorded conversation of that telephone call.

Under cross-examination, the appellant admitted that in his telephone conversation with Rasul he did say to Rasul:

> ...kalau tak dapat 7 pun bayar, dapat 5 pun tak apa.

The appellant also admitted that he requested Rasul to come to his office (appellant) before 12.45 p.m. and had said:

> ...kertas sokongan ini berada di depan saya.

The appellant testified that a BPR officer by the name of Abdul Ghani bin Abu (SP10) ("Ghani") visited him in his office for about 30 to 40 minutes. The appellant described Ghani as his old friend and Ghani had, during that visit, requested for old things to "tarik duit dari langit". Surprisingly, Ghani's presence in the appellant's office had nothing to do with the trap which was in store for him. Ghani himself did not know that his office was gunning the appellant down. Be that as it may, the appellant testified that one hour after Ghani had left his office Rasul arrived. As Rasul put his hands in his pocket, the appellant requested Rasul not to do so. Rasul sat for approximately one minute and he then got up and handed the money to the appellant. The appellant admitted receiving the money and he said that he then threw the money on the chair without counting it. As Rasul left his office the BPR officers rushed in. At that juncture, according to the appellant he was standing near his table and he denied that one of the officers from BPR recovered the money from beneath his left thigh.

Bluntly put, the defence was that the appellant did not ask for corrupt money from Rasul in connection with the issuance of the birth certificate to Samirah. The defence alleged that Rasul had framed him up.

The denial by the appellant that he did not solicit RM500 from Rasul was completely demolished by the tape-recorded conversation between both parties (P9) that became the corroborative link of the appellant to the offence. In that tape-recorded conversation (P9) it was the appellant that demanded the money and at same time requested Rasul to bring the money to his office on that day. Under cross-examination, the appellant admitted that he had requested Rasul to go his office on 31 December 1992 and the appellant even agreed (this must surely be a crucial admission) that his comments and recommendations were important factors to be taken into account by his headquarters in regard to the issuance of the birth certificate of Rasul's daughter. In the "borang kenyataan" (P36) containing the questionnaire for Rasul to answer, a column entitled "ulasan dan sokongan" was completely left blank and at the bottom portion the appellant wrote the words: "Saya mengesyorkan supaya permohonan ini di pertimbangkan untuk diluluskan." Why did the appellant leave blank those portions in P3C which were supposed to be filled by the appellant? No answers were given by the appellant for such an omission. The probable inference that could be drawn from the appellant's conduct in relation to P3C was for the appellant to show to Rasul that the application in P3 was being attended to in order to obtain the money which he demanded that morning over the telephone.

Next, the conduct of the appellant and his explanations that he did not want Rasul's hands to be inserted in the pocket because "mungkin dia keluar pistol, pisau atau wang itu bahaya pada kita" could not, in the circumstances, be accepted because the appellant knew the purpose of Rasul's visit to his office that day.

In an attempt to show that Rasul had framed up the appellant, the defence sought to introduce evidence that Rasul had called the appellant on 31 December 1992 at 8.00 a.m. from the public telephone booth before Rasul telephoned the appellant at the BPR's office. In my judgment, these two pieces of evidence cannot go to show that the appellant was being framed and even if they were to be read in that context questions were not put to Rasul in the course of his cross-examination (*AEG Carapiet v. AY Derderian* [1961] AIR Cal. 359; *Re Pichi Muthu* [1970] 2 MLJ 143; *Wong Swee Chin v. PP* [1981] 1 MLJ 212 FC; *PP v. Datuk Hj. Harun bin Hj. Idris & Ors.* [1977] 1 MLJ 180 especially at p. 194) and, consequently, they can be dismissed as mere after thoughts. Again, the denial by the defence that the trap money was not found underneath the left thigh of the appellant could not be accepted as such discovery was not challenged at all by the defence. In any event, it is my judgment that it is not incumbent on the prosecution to prove that the money was subsequently found in the possession of the appellant, what is important is that the trial Court must be satisfied from the evidence that it was the appellant who had received the money. Here, the trial Court came to that conclusion and called the appellant for his defence and, after hearing the defence story, was fully satisfied that the defence had failed to rebut the presumption.

It was argued before me that the trial Court had failed to carefully consider the defence and give reasons for rejecting it. This argument was modelled on the principle as set out in *Vijayaratnam v. PP* [1962] MLJ 106. The same principle was echoed way back in 1952 in the case of *Sultan Mohd. v. R* [1952] MLJ 186. A perusal of the grounds of judgment would clearly show that the trial Court had microscopically examined Rasul's evidence and tested it against the evidence of the other witnesses before embarking to accept the reliability of Rasul's evidence. The trial Court also devoted a great deal of judgment space to the defence and gave cogent reasons for rejecting the defence story.

Next, the defence questioned the failure of the prosecution to mark as an Exhibit "P", another cassette tape which Rasul took along with him during the confrontation with the appellant on 31 December 1992. It must be remembered that this cassette tape was marked by the prosecution as ID8 and all along was not suppressed by the prosecution. The defence knew of the existence of ID8 but somehow the prosecution did not mark it as P8. This resulted in the submission by Counsel for the appellant that an inference adverse to the prosecution ought to be made. I was invited to invoke s. 114(g) of the Evidence Act against the prosecution. With respect, I cannot see how the failure to mark ID8 as P8 would cripple the prosecution's case to such an extent as to attract s. 114(g) of the Evidence Act for the simple reason that the prosecution has never made any attempt to conceal nor suppress the existence of ID8 (see *Munusamy v. PP* [1987] 1 CLJ 250 SC; [1987] 1 MLJ 492 SC). The failure to mark ID8 as P8 cannot be equated with the decision in *Ghazali bin Salleh & Anor. v. PP* (*supra*) where the non-production of the cassette tape for 31 May 1986 episode without reasonable explanation was held to be fatal. Here, ID8 was produced but not marked as a 'P' exhibit and the pertinent question to ask is this: Without ID8, can the prosecution prove its case beyond reasonable doubt? The answer is in the affirmative. The tape-recorded conversation (P9) and the recovery of the trap money as found by the trial Court beneath the left thigh of the appellant were tangible evidence to link the appellant with the crime and the defence of the appellant rightly analysed by the trial Court resulted in the conviction of the appellant.

Next, it was submitted that there was no voice expert to identify the appellant's voice in the cassette tape (P9). This submission was made notwithstanding that the appellant admitted that Exhibit (P9) was the tape-recorded conversation between himself and Rasul. It must be noted no objection whatsoever was taken to the admissibility of Exhibit (P9) before the trial

Court and the principles to be applied where objection to the admissibility of evidence is not taken at the trial were enunciated by Viscount Simon L.C. in *Stirland v. Director of Public Prosecutor* [1944] AC 315 PC, namely, not a proper use of Counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. In the local context *Hamsa Kunju v. Regina* [1963] 29 MLJ 228 serves as a supporting authority to that of *Stirland*. In short, it is too late in the day for the defence to raise an objection as to the admissibility of (P9) at the appellant stage when the defence kept quiet and played dumb before the Sessions Court. At any rate, it must not be forgotten that Rosni recognised the appellant's voice in Exhibit (P9) and again this point was not challenged by the defence.

The appellant is an educated individual. He graduated from Universiti Kebangsaan Malaysia majoring in Sociology in 1979 and held various posts in the Government service. He was also, at one time, gazetted as a second class Magistrate and knew that accepting bribe was wrong and an offence under the law. In his defence, he sought to push the blame entirely to Rasul - alleging that it was Rasul who wanted to give him the money and that he did not at any time demand any money from Rasul. The episode of 29 December 1992, if one were to accept the version of the appellant as true that it was Rasul who wanted to bribe him for expediting the processing of his daughter's birth certificate then the question to ask is this: Why didn't the appellant report it to the BPR whose office was a stone's throw away from his office? Now, even if we take the appellant's version that he did not have time to report to the BPR because he least expected Rasul to give him the money, then the next probable question to ask is this: Why didn't he tell Ghani, his BPR friend, about the bribe offered by Rasul on 29 December 1992 when Ghani visited him on 31 December 1992? That would be the golden opportunity for the appellant to rid himself of the label of being corrupt. Taken from this stand, the defence was nothing else than a flimsy excuse to exculpate the appellant from the charge of corruption. The appellant should consider himself lucky that there was no cross-appeal by the prosecution against inadequate sentence. If there was one, the appellant might end up in prison after the appeal was heard by me. I must stress that in cases of corruption it is necessary to impose a sentence of imprisonment as a sentence of fine has no deterrent effect. Corrupt Government servants should be sentenced severely as examples to others and also to protect the image of the Government service as a whole. It is common knowledge that cases of corruption are difficult to prove but when a case is proved the offender should be imprisoned and such a sentence would be consistent with the enormity of the offence committed by him and, likewise, be in direct proportion to the measure of confidence which the Government has reposed in him. I venture to say that the fact that the appellant here has lost his important post and has suffered the anguish of a trial and the appeal cannot be considered to be a mitigating circumstance (see the local cases on sentencing in corruption cases like *Rex v. Teo Cheng Lian, Rex v. Leck Kwee See* [1949] 15 MLJ 170; *Goh Leng Sai v. Reg* [1959] 25 MLJ 121; *Mansell Jones & Anor. v. PP* [1952] 18 MLJ 43; and *PP v. Yap Chong Fatt* [1963] 29 MLJ 136).

Finally, it was argued that on the available evidence there was a miscarriage of justice if the appellant was not acquitted and discharged. In *Mraz v. The Queen* [1955] 93 CLR 493, 514 it is said that:

> It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rule of procedure and evidence are strictly followed. If there is any failure in any of these aspects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law,

a miscarriage of justice. Justice has miscarried in such cases because the appellant had not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

But the position here is no where like *Mraz.* Before the trial Court, the trial proceeded according to the rules of procedure and the appellant was defended by Counsel of his own choice. Before me, the appellant was also represented by Counsel of his own choice. Contrary to what learned Counsel for the appellant felt, there would be a gross miscarriage of justice if the appellant here on the available evidence, was not found guilty and convicted thereof. Here was a simple case of soliciting corrupt money and receiving corrupt money to expedite the issuance of the birth certificate of Rasul's daughter. Even without the evidence of Rasul's two wives, the evidence was as solid as the rock of Gibraltar. The first wife by the name of Zaleha bt Abdullah ("Zaleha") was not the principal actress in the whole episode as Samirah was not her daughter. The second wife by the name of Hasnah, as stated in the early part of this judgment, attended the interview conducted by the appellant on 29 December 1992 and her interview was documented by the appellant as per Exhibit P3(a). Unfortunately, attempts to trace Hasnah were futile. Rasul himself testified that Hasnah was no longer with him since 17 January 1993 and that she had gone to Kuala Lumpur. Rosni was detailed to locate Hasnah and this too was fruitless. Through Zainab binti Abu (SP14) the prosecution introduced the statement of Hasnah (P14) recorded under s. 112 of the Criminal Procedure Code and the trial Court did not rely on Exhibits P3(a) and P14 to convict the appellant. Hasnah's absence was satisfactorily explained by the prosecution (*Dalbir v. S* [1977] Allahabad 472 SC) and, consequently, the adverse inference rule cannot be invoked by the defence. Be that as it may, this was a case of the trial Court believing Rasul's story and testing it against the evidence of the other prosecution witnesses and at the same time weighing the evidence of the appellant according to *Yuvaraj*. Once there was a finding that corrupt money was received by the appellant, it was up to the appellant to rebut that the money was not corrupt money and as to how the appellant could do so is best left to his ingenuity.

I had no choice but to dismiss the appeal.